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# In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 575.

JAMES R. SEWELL,

*Petitioner,*

vs.

STATE OF OHIO,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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(c) the witnesses recognized the man as the one they had seen at the scene of the bombing,

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## OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed without opinion. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right for the reason that no substantial constitutional question exists in this case.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

## STATEMENT OF THE CASE.

An indictment charging the appellant James R. Sewell with maliciously placing a bomb (Ohio Revised Code 2907.081) was returned by the Cuyahoga County Grand Jury on July 14, 1966. The case was tried to a jury in the Common Pleas Court from September 18, 1967 to September 22, 1967. The jury returned a verdict of guilty as charged in the indictment.

The defendant was then sentenced to the Ohio State Penitentiary and fined $10,000.

The evidence disclosed that on June 28, 1966 at approximately 12:15 a.m. Mr. and Mrs. Charles Gard, were in bed in their residence, located at 2604 East Overlook Road, Cleveland Heights, Ohio, were awakened from their sleep by the noise of breaking glass in the living room area of their home. They got up and went to the bedroom window. Upon looking out the window they saw a car driving away from their home. At approximately the same time there was a heavy explosion in the first floor living room area of their home. Mr. and Mrs. Gard then left their home until the Cleveland Heights Police and Fire Departments arrived at the scene, when they reported what had happened.

Next door, at 2606 East Overlook to the east of the Gard residence, was the residence of Camilla Burby, a 19-year-old student at Rosemont College, who at the time of trial was in her sophomore year. She was entertaining friends on the rear patio of her home, among whom were Michelle Day, Brent Murphy, Marty Mullen, Charlotte Meers, Nancy Highland, Cindy Harper and a Mickey Champion.

The testimony of Miss Burby, together with that of Michelle Day, Brent Murphy and Marty Mullen, was that shortly after midnight they heard glass breaking in the

front part of the Gard residence. They ran down the Burby driveway toward East Overlook and while running they saw the defendant, James R. Sewell, running from the front of the Gard home toward his 1963 Chevrolet station wagon, which was parked, with the motor running, directly under a street light in front of the Gard residence.

These witnesses chased after Mr. Sewell. They were from 10 to 20 feet away from him when he stopped underneath the traffic light and looked directly at them before entering the driver's side of his car and driving away east on East Overlook. In so doing he passed the Burby residence.

With Miss Burby in the lead, the witnesses on foot chased the Sewell car up East Overlook. The car had its lights on, enabling Miss Burby to see the license number and shout it out to the others about her. She testified (R. 213-214):

> "A. Well, I continued to chase the car up the street until I got close enough to see the license number.
>
> Q. Do you recall what that license number was?
>
> A. Yes, I do.
>
> Q. What is that?
>
> A. RV 840.
>
> Q. What did you do when you saw this license number?
>
> A. I called it out."

As the witnesses walked back toward the Gard home there was an explosion blowing the front window of the Gard home asunder. They immediately ran into the Burby residence and called the Cleveland Heights Police Department.

Miss Burby gave the license number to the Cleveland Heights police when they arrived at the scene.

At approximately six o'clock on that same morning Michelle Day, Mickey Champion, and Marty Mullen were

taken to the Cleveland Heights Police Station. (Mickey Champion was not in the United States at the time of trial and did not testify.) The four students who testified all said that at the Cleveland Heights Police Station they identified the automobile of James R. Sewell as the one they saw leaving the front of the Gard home immediately after they heard the glass breaking.

While in the Cleveland Heights Police Station they were asked to look out a window. They saw a police officer and another man walking across the yard and they all recognized the man with the police officer as the man they saw running from the Gard home just before the explosion.

Each of the four students was called back to the Cleveland Heights Police Department later on in the day or early evening of June 28, 1966. Each separately viewed a lineup of five men. Each separately identified the petitioner, James R. Sewell, as the man they had seen running from the Gard home shortly after midnight. Each of the four students also identified the defendant in the courtroom as the man he or she saw running from the Gard home shortly before the explosion took place.

The Cleveland Heights Police Department, headed by Captain Earl J. Gordon, obtained a listing on license No. RV 840, the number given to them by Camilla Burby. That license was listed to the defendant, but on his Bureau of Motor Vehicles application Mr. Sewell had listed his address at 37850 Midland Drive, Willoughby, Ohio, when his address was actually 37850 Milann Drive, Willoughby Hills, Ohio. A copy of the Motor Vehicles Registration application was admitted into evidence as State's Exhibit 13.

Because of the erroneous address on the Bureau of Motor Vehicles application there was some delay in the

Cleveland Heights police arriving at the home of James R. Sewell. However, the defendant was arrested at his home early that same morning and taken to the Cleveland Heights Police Station, where he was identified by the aforementioned witnesses.

Fire inspector Robert Maver of the Cleveland Heights Fire Prevention Bureau testified as to the extent of damage caused by the explosion at the Gard residence. He testified that the damage was caused by the detonation of an explosive in the living room.

The defendant took the stand in his own behalf. He gave his occupation as a dredgeman and admitted that he had been convicted of robbery in 1941 and served time in the Mansfield Reformatory, and was again convicted of armed robbery in 1945 and served time in the Ohio State Penitentiary.

He testified that on the late evening of June 27, 1966 he left his home in Willoughby Hills and went to an apartment in Cleveland where his step-son, Jack resided. He stated the apartment was on East 107th Street behind the Greyhound Bus parking lot, south of Euclid Avenue.[1] He Claimed that it took him from one to one and a quarter hours to drive to his step-son's home, that he pulled into the parking lot next to his step-son's apartment, looked up to the particular suite, and seeing that his step-son's light was out, turned around, drove out of the lot and returned to Willoughby Hills without ever getting out of the car; that this was at approximately 10:30 p.m.

On cross-examination (R. 530) it was brought out that he did not know how many floors were in this apartment building, which window was in his step-son's suite; he had no idea how long the apartment building was or

---

[1] This address is less than two miles to the west of the scene of the bombing.

how many windows faced the parking lot. (R. 529-533.)

He said that he arrived back home at approximately 11:10 and proceeded to watch the news on television and a movie for about 15 minutes and then went to bed. He was awakened by the Cleveland Heights Police Department early in the morning when they came and arrested him and took him to the Cleveland Heights Police Station.

## QUESTIONS PRESENTED.

The questions presented in the petition do not accurately present questions raised by the record. Respondent submits that the subject matter of petitioner's questions would be more properly stated as follows:

I. Was the accused deprived of due process of law where

(a) witnesses to the bombing of a residence were taken to the police station to view a car,

(b) while in the police station they briefly glimpsed through a window a man walking outside the police station in the company of an officer,

(c) the witnesses recognized the man as the one they had seen at the scene of the bombing,

(d) the witnesses later separately identified the man in line-ups as the one at the scene of the bombing,

(e) the witnesses made solid in-court identifications based on their on-the-scene observations.

II. Was the petitioner deprived of due process of law and equal protection of the laws where a preliminary hearing was continued at the request of the prosecution, the petitioner was thereafter indicted by a grand jury, and the preliminary hearing was never thereafter resumed.

III. Was the petitioner deprived of due process of law by the denial of motions for pretrial discovery of all statements and notes of witnesses in the possession of the prosecution and for inspection of notes of a prosecuting witness who testified at the trial.

## ARGUMENT.

At the outset, it should be made clear that the excerpts from the trial record appended to the petition do not fairly reflect the totality of the circumstances surrounding the identification or the total atmosphere of the petitioner's trial.

**I. Was the accused deprived of due process of law where**

**(a) witnesses to the bombing of a residence were taken to the police station to view a car,**

**(b) while in the police station they briefly glimpsed through a window a man walking outside the police station in the company of an officer,**

**(c) the witnesses recognized the man as the one they had seen at the scene of the bombing,**

**(d) the witnesses later separately identified the man in the line-ups as the one at the scene of the bombing,**

**(e) the witnesses made solid in-court identifications based on their on-the-scene observations.**

Petitioner admits that the rule requiring the exclusion of identification evidence obtained in a line-up conducted in the absence of counsel does not have application in this case, but contends that the circumstance of his having been seen by witnesses while walking outside the police station are "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to

deny him due process. The record does not support his contention. The petition refers to a one-man lineup conducted by the police. This is a misstatement. There was no one-man line-up.

The testimony during the voir dire examination (R. 119-141) of Michelle Day, which was requested by defense counsel and which took place outside the hearing of the jury, clearly shows that the lineup identification was not fundamentally unfair to this defendant.

Michelle Day testified that at the time she identified the defendant at the Cleveland Heights police department, she was not even aware that she was going to view a possible suspect in connection with the bombing of the Gard residence. She testified, as did the other three witnesses later, that she was brought to the Cleveland Heights Police Department on the early morning of June 28, 1966 to view a car; and that after she identified the car as being the one that left the bombing scene she was taken into a room in the Cleveland Heights police station. While waiting in the room and without ever being told that she was going to be requested to identify anyone, a police officer in the room asked her to look out a window which faced the yard. She looked out the window and saw a policeman walking across the yard with a man whom she instantly recognized as the same man who ran from the Gard home earlier that morning. She so informed the police officer in the room at that time. The testimony of the other three identification witnesses was substantially the same.

Michelle Day and the other three witnesses returned to the Cleveland Heights police station later that same day and separately made statements to the Cleveland Heights police. They also separately viewed lineups in which there were five men. From the lineup each witness

separately identified the defendant James R. Sewell as the man they saw running from the Gard home early that morning.

The record at page 138 shows that there was no effort whatever made by the Cleveland Heights police department to influence the witnesses in their identification of the defendant.

The testimony of Miss Day on voir dire is as follows:

(R. 132):

"Q. Did they take you to a window and say, "Look in there"?

A. Yes.

Q. Did they point out the defendant to you?

A. Oh, no.

Q. What did they do?

A. They just said, "Do you see the man?"

Q. The man you saw this morning?

A. No, "Do you see the man you saw last night?"

Q. But you looked and saw the same man that you had seen that morning, right?

A. Yes."

(R. 138):

"Q. As you recall, the only thing that the officer in this room said to you was, 'Look out the window,' is that right?

A. Correct.

Q. Before you were put in that room, did anybody tell you you were brought in that room to identify anybody?

A. No, they did not.

Q. When you were brought down to that police station, for what reason did they ask you to come down there?

A. They told us they had gotten the car that they thought had been used the night before and would we identify it as the car.

Q. So you were brought down there to identify the car?

A. Correct.

Q. And when you were in the room, a police officer said to you 'Look out the window'?

A. Yes.

Q. Did he point anybody out to you?

A. No.

Q. When you saw this man what did you say?

A. I said, 'That's the man.' "

(R. 139):

"Q. All right. I believe you stated that—was there any difference as you observed him in the lot from where you observed him on Overlook Drive earlier that morning?

A. He had on different clothes the next morning.

Q. Any other difference?

A. He didn't have his glasses on.

Q. He had glasses on when you observed him in the early morning hours in front of the Gard residence, is that right?

A. Yes.

Q. When you saw him walking across the yard he did not have glasses on?

A. Yes.

Q. Did you call that to the attention of the officer there?

A. Yes."

(R. 140):

"Q. And then later on that evening the police officer took you to a room, I believe you said?

A. Yes.

Q. And you were asked to look through a window there and view a lineup wherein you identified the defendant in this case, is that right?

A. Yes.

Q. And he was in the lineup with four other men?

A. Yes.

Q. Did anybody tell you to point out this man. * * *

A. No.

Q. And those were the only two times that you have seen him in the morning, once in the parking lot, later on, in the later part of the day, in the lineup room, is that right?

A. Yes."

After the voir dire examination of Michelle Day the Court overruled the defense motion for suppression of her in-court identification. The Court stated:

(R. 142):

"The Court has well in mind the testimony of the captain, as well as that of this young lady who just testified. I think that the main issue is whether or not Mr. Sewell's constitutional rights were violated at the time of the so-called identifications.

It would appear that the witness would have had as much of an opportunity to say that is not the man as she would have had to say that that is the man. What the matter resolves itself to is whether or not the credibility of the witness can be taken."

Rather than have separate voir dire examinations of the three subsequent witnesses who also identified the defendant at the Cleveland Heights police station and in court, defense counsel (R. 222) reserved his right to raise the impropriety of the in-court identifications but stated that he would base it on his cross-examination in the presence of the jury.

Petitioner mistakenly asserts that the identification procedures in *Foster v. California,* _____ U.S. _____, 22 L. ed. 2d ____, 89 S. Ct. 1127 were "infinitely supe-

rior" to the treatment accorded petitioner. Here, unlike Foster, there was no lack of positive identification at any time; there was no tentative identification in a one-to-one confrontation between petitioner and any witness; the police never said, "This is the man"; there was no contrast between petitioner and the other men exhibited in the actual lineup; in sum, there were no suggestive elements making it all but inevitable that every one of the four witnesses would identify petitioner whether or not he was "the man" they saw running from the scene, entering a car, and driving away.

Petitioner is also mistaken in asserting that the State offered no evidence that he was in his car during the night in question. The witnesses identified him as the man they saw entering a car which bore his license number and driving away. The reliability of their testimony was a matter for the jury. The witnesses based their in-court identifications, as they did their lineup identifications, upon their views of the defendant at the scene of the crime. Any impression from the testimony of Brent Murphy quoted at page 28 of petition that his lineup identification resulted from seeing the man in the parking lot was cleared up by this witness on cross-examination when defense counsel asked (R. 306):

> "Q. At that time you were able to say, in the line-up, that this is the man I saw in the parking lot, were you not?
>
> A. Not at that time. I said, 'This is the man that I saw running, that looked up, at the car that previous time.' "

The point here is not whether there was any basis for the parking lot viewing; the point is whether it undermined the reliability of the in-court identification by the witnesses. Each witness testified that his in-court identifi-

cation was based on his view of "the man" at the scene of the crime on the night in question. (See appendix.)

There is no reason whatever to suppose that the conviction of the petitioner was brought about by anything other than the in-court testimony that the defendant was the man the witnesses observed at the scene. The totality of the circumstances establishes a complete absence of any identification procedures leading to the "irreparable mistaken identification'" condemned in *United States v. Wade,* 388 U.S. 218, and *Gilbert v. California,* 388 U.S. 263.

**II. Was the petitioner deprived of due process of law and equal protection of the laws where a preliminary hearing was continued at the request of the prosecution, the petitioner was thereafter indicted by a grand jury, and the preliminary hearing was never thereafter resumed.**

The essence of petitioner's contention appears to be that since some defendants in state courts receive full preliminary hearings, he was unfairly discriminated against.

Petitioner has not cited any decision affording a full preliminary hearing to an accused even though an indictment has been returned in the meantime. This Court has said that the rights of the accused were to be protected at trial. As stated by Mr. Justice Black, in *Costello v. United States,* 350 U.S. 359, 363, 100 L. ed. 398, 402: "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

The law in Ohio is well stated in *State v. Minamyer,* 12 Ohio St. 2d 67, in the first paragraph of the syllabus:

"The only purpose of a preliminary hearing is to determine whether sufficient facts exist to warrant the court in binding the accused over to the grand jury and to set bail, and once an indictment has been returned by the grand jury, a preliminary hearing before a magistrate is no longer necessary."

**III. Whether the denial of motions for pretrial discovery of all statements and notes of witnesses in the possession of the prosecution in a state case and for inspection of notes of a prosecution witness who testified at the trial constitutes a violation of due process.**

The decision in *State v. White,* 15 Ohio St. 2d 146, cited by petitioner considers (1) the denial of a motion—by the defendant for pretrial discovery of his oral and written statements and (2) the denial of a motion for inspection of statements of prosecution witnesses about which they had testified at the trial.

The Court upheld the denial of the defendant's motion for pretrial discovery, and stated that the Ohio rule has been as follows (15 Ohio St. 2d 159):

"Prior to the trial of a criminal case a court may properly refuse an application by defendant or his attorney to require a prosecuting attorney to submit for his inspection and examination a statement made by the defendant respecting the crime involved, reduced to writing and in the possession of the prosecuting attorney. *State v. Corkran,* 3 Ohio St. 2d 125, paragraph one of the syllabus. See, also, *State v. Sharp,* 162 Ohio St. 173, and *State v. Yeoman,* 112 Ohio St. 214."

As far as pretrial discovery is concerned it should be noted that in this case defense counsel had statements taken from two of the witnesses shortly after the bombing

and that he used them for cross-examination of witnesses Martin Mullen and Brent Murphy.

The controlling circumstances in *White* which the Court held would require an *in camera* inspection in the course of the trial are set forth in paragraph 3 of the syllabus: "Where the state's principal witness admits in open court that her testimony is inconsistent with some or all of her prior statements to the police, and, in addition, that these prior statements are inconsistent with each other * * *." Paragraph 4 of the syllabus commands an *in camera* inspection by the *trial court* to determine the existence of inconsistencies between the *testimony* of the prosecution's witnesses and their prior statements.

Nowhere in the petition herein is it asserted that any prosecution witness said on the witness stand that his testimony was inconsistent with any statement he had given to the police. At no time during the petitioner's trial was there any request by the defense for any *in camera* inspection by the court.

The holding in *Jencks v. United States,* 353 U.S. 657, 1 L. Ed. 2d 1103, that the government is required to produce for the defendant's inspection statements made by government witnesses relating to events and activities about which these witnesses testified at the trial, without a prior determination of their relevancy and materiality by the judgment, is not binding upon state courts. *Polermo v. United States,* 360 U.S. 343, 356, 3 L. Ed. 2d 1287.

There is no indication anywhere in this case of the deliberate, extensive repression of exculpatory evidence condemned in *Brady v. Maryland,* 373 U.S. 83, and *Giles v. Maryland,* 386 U.S. 66.

## CONCLUSION.

Due Process of Law was never flouted in the trial of petitioner. Petitioner had an eminently fair trial before a fair and impartial court and jury and nowhere were any federal constitutional standards either misapprehended or misapplied. That the in-court identifications by four witnesses were tainted by the brief glimpse of the defendant in the police station lot is mere speculation nowhere sustained in the record. The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN T. CORRIGAN,
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WILLIAM J. COYNE,
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# APPENDIX.

## Transcript of Trial Testimony.

### MICHELLE DAY, Direct.

(151) A. I was facing the car, and as he went around the back of the car he turned around and looked at me.

Q. He was facing you then?

A. Yes.

Q. For how long a period of time did you have a chance to observe him in this manner other than running down the drive?

A. Seven seconds under the street light.

(156) Q. Was there anything different about the defendant on the occasion when you observed him at the police station than when you observed him earlier in the evening in front of the Gard home?

A. Yes, he had on different clothes and he did not have his glasses on.

### CAMILLA BURBY, Direct.

(212) Q. All right. As he came to the back of the car what, if anything, did he do?

A. As he was running around the back of the car he turned around and looked at me and at my friends.

Q. Now, the man that you have stated that you saw running from the Gard home and had stopped and looked at you under the street light there, do you see him in court today?

A. Yes, I do.

Q. Would you point him out for the Court and jury, please?

A. Right there.

(218) Q. And while up in this room was there anything else that you observed?

A. We were told to look out of the window.

Q. When you looked out the window what, if anything, did you see?

A. We saw two men walking from one building to the other, from one side of the building to the other.

Q. Did you identify either of those men?

A. Yes, I identified one as the man that is in the courtroom now, that I identified running from the Gard house the night before.

CAMILLA BURBY, Cross.

(226) Q. Now, was there anything distinctive, any mark, any particular thing, about the face that you saw of the man running down the lawn which makes it stick in your memory?

A. I would say that the thing that made this face stick in my mind was that as he turned to look at me, the shadows from the light above him kind of made his face very distinct to me. So that it was dark outside, and the thing, like a focal point, was his face.

(246) Q. Well, as a matter of fact, the officer said, "Look out there," or words to this effect, didn't he?

A. Words to this effect.

(252-53) Q. You were asked to go and see the man that you had also seen in the parking lot that morning?

A. No, they didn't say that.

Q. They didn't say that, but it was the same man?

A. It turned out to be the same man.

Q. When you got there you recognized the man whom you had seen in the parking lot, right?

A. And the man I had seen the night before.

(256) Q. And the policeman directed your attention to look out the window, right?

A. I think the policeman did. Either that or one of the other young people that I was with said, "Come here a second."

(265) Q. You are quite clear that you did or you think you shouted something as you ran down the lawn?

A. I don't remember. The only thing I remember from that night vividly is the license number and the face of a man under a street light.

Q. Now—

A. Those are the things that stick in my mind.

BRENT MURPHY, Direct.

(283) Q. You say you heard somebody shout something just as he was getting in the car?

A. Yes.

Q. When you say he looked up, which direction was he looking?

A. He was looking towards us.

MARTY MULLIN, Direct.

(319) A. When I saw him run, we started to pick up our pace. Someone hollered for him to stop. He stopped, turned around, glanced at us and kept running around the car, got in and drove away.

(324) Q. After you identified this automobile, what did you do then?

A. I went into a room along with the others and as I was in the room, I looked out the window. I saw the man I saw running across the Gard lawn the night before.

(325) Q. Did you identify any one of them in the lineup?

A. Yes, I did.

Q. Whom did you identify?

A. I identified the man sitting over there, the man I saw running across from the Gard home.

(326) A. I identified the man running across the lawn of the Gard home the night before.

MARTY MULLIN, Cross.

(355) Q. And the police officer inside the room with you called your attention and said, "Look out there," or something to that effect, did he not?

A. That's right.